IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 523

SOUTHGATE BROKERAGE COMPANY, INC.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY TO BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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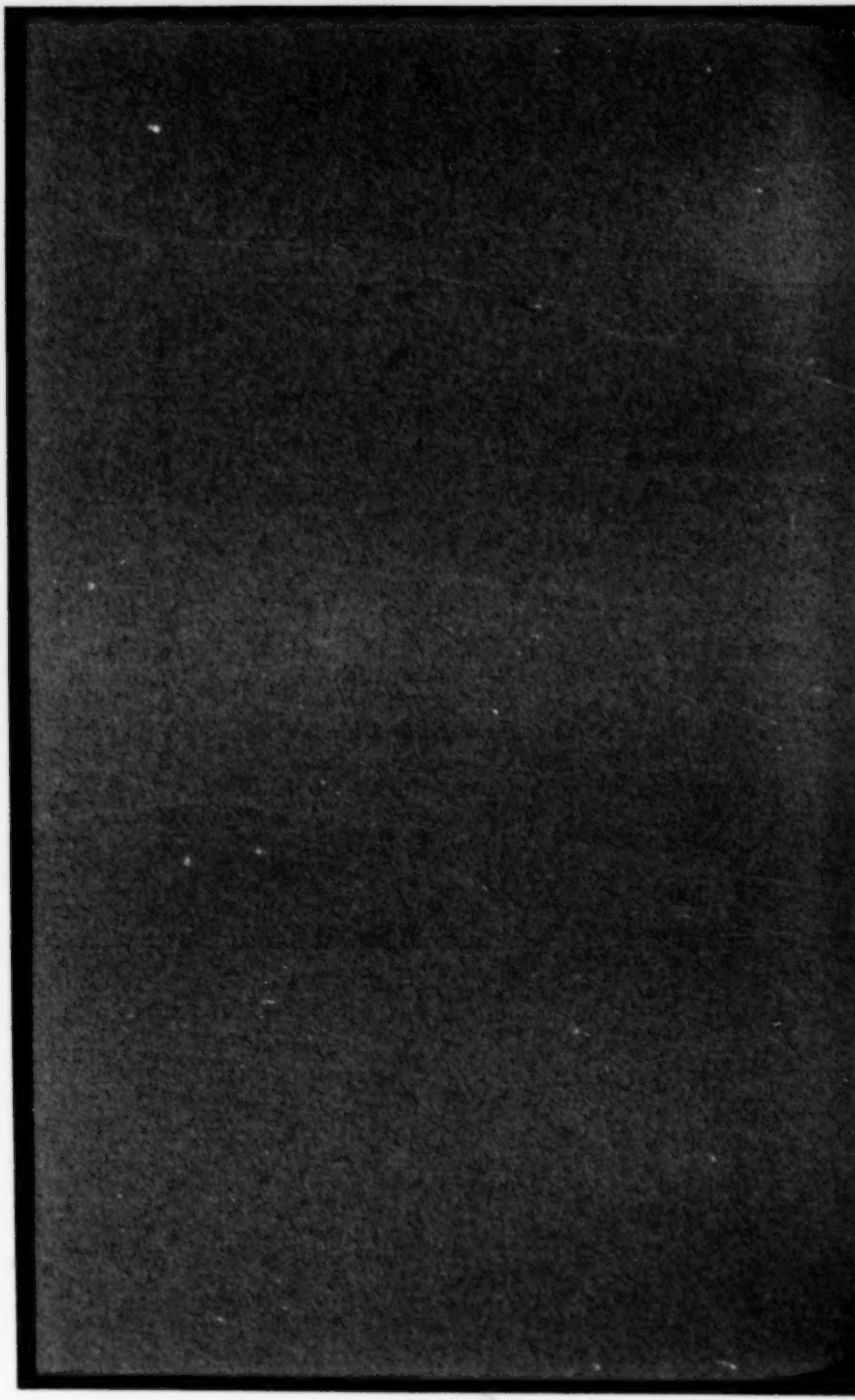

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The Issues

In its brief opposing a writ of certiorari herein, the respondent argues that the writ should be denied for the following reasons:

(1) That the petitioner's contention that the order is invalid because the Commission failed to find that petitioner renders no service to sellers is without merit, because

"All the Commission had to find was that petitioner was the buyer and was receiving brokerage";

(2) That subsection 2(d) does not authorize receipt by a buyer of a "brokerage commission," but is intended to prevent discriminatory payments to a customer "for 'any services or facilities furnished by or through such customer' in connection with the processing, handling or sale of any commodity by such customer";

(3) That, since the Commission's order applies only to "brokerage" or payment "in lieu thereof," and not to compensation for other services, the evidence offered by petitioner (to show the true nature of the compensation received and the services actually rendered therefor) "was immaterial to the issues in this case."

This draws the issues very clearly. *First:* Is an order of an administrative agency valid, when it is required to be based on findings of fact and those findings, admittedly, do not incorporate one of the prescribed statutory standards? *Second:* Can an order of the Federal Trade Commission proscribing receipt of "brokerage" under subsection 2(c) of the Robinson-Patman Anti-Discrimination Act stand, when the Commission refused to permit evidence to be introduced showing that the payments are not "brokerage commissions" but, in fact, are compensation for services such as, admittedly, may be compensable under subsection 2(d)?

ARGUMENT

As to Respondent's Point 1

The respondent brushes aside the statutory language of subsection 2(c) by saying that "petitioner's contention that the Commission's order is invalid because the Commission failed to find that petitioner renders no services to sellers is without merit. All the Commission had to find

was that petitioner was the buyer and was receiving brokerage" (respondent's brief, pp. 7-8).

In short, *the Commission flatly and frankly contends that it is not required to make any finding whatsoever as respects the positive statutory exception permitting payment or receipt of compensation "for services rendered* in connection with the sale or purchase of goods, wares, or merchandise."

On the basis of the uniform decisions of this Court, we challenge any such attitude on the part of any administrative agency.[1] The Commission's position plainly is that it is not required to follow the test laid down by the Congress, but may base its order on only part of the directive, set forth for the protection and guidance of legitimate business and the citizens who are endeavoring in good faith to comply with its plain and unambiguous language.

This, we submit, is directly contrary to the rule plainly and succinctly laid down by this Court. In *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 489, 495, 86 L. Ed. 971, 62 S. Ct. 722, the Court said:

> "Congress has prescribed statutory standards pursuant to which those rights are to be determined. Neither the Court nor the Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. * * * An insistence upon the findings which Congress has made basic and essential to the * * * Commission's action * * * is no more and no less than an insistence upon the observance of those standards which Congress has made 'prerequisite to the operation of its statutory command.' Opp Cotton Mills v. Administrator of Wage and Hour Division, 312 U. S. 129, 144, 85 L. Ed. 624, 635, 61 S. Ct. 524. Hence that requirement is not a mere formal one."

[1] Cases cited, petition, p. 6.

The Commission *categorically admits* that it has failed to follow such prerequisite in this proceeding, and it is plain the case should be remanded to it for compliance with the statutory command that a basic finding be made as to whether services, *in fact,* were rendered by petitioner. That its rendering of services is not a *legal* impossibility, is clearly shown by subsection 2(d), which expressly recognizes such a function.

The real effect of what the Commission urges here is that its order should be sustained on the basis of the statute with the "except for services rendered" clause completely eliminated. It frankly states it was sufficient for it to find that petitioner was the buyer and was receiving brokerage. Admittedly, this would be all it would be required to find under the statute with the "services rendered" clause stricken out, *but it is not all that is required under the statutory language as written by the Congress.*

Under the clear wording of the statute, Congress was not outlawing the payment or receipt of "brokerage," but was outlawing it "except for services rendered." And, a finding as to the furnishing of these services by petitioner, the Commission not only designedly omits, but, likewise, prevents petitioner from proving the bona fide services it actually rendered. We do not believe this Court will permit such an open disregard of the basic Congressional prerequisite to stand.

As to Respondent's Point 2

We fully agree with respondent's statement (brief, p. 8) that subsection 2(d) of the statute permits payment of nondiscriminatory compensation to a customer "for 'any services or facilities furnished by or through such customer' in connection with the processing, handling or sale of any commodity sold by such customer."

The respondent objects to application of this provision to the compensation paid petitioner herein, however, on the *sole* ground that it does not authorize "receipt by a buyer of a brokerage commission" (brief, p. 8). *This brings us to the very crux of petitioner's case,* and, we submit, is a clear exposition both of respondent's anomalous position and the reversible error in the case at bar.

Petitioner, at the very outset of this proceeding, in its answer (R. 11) to the Commission's complaint, raised the issue, in defending its action, that the so-called "brokerage" was, *in fact,* compensation received for definitely described services actually rendered. It has consistently sought to introduce such evidence (R. 88-89), and the Commission, as consistently, has prevented it from so doing.

Having refused to admit any testimony showing the *true nature* of the compensation petitioner received, and the bona fide services it rendered therefor, the Commission nevertheless proceeded to issue its order of prohibition against receipt of *this identical compensation,* merely by denominating it "brokerage." It now defends its action by asserting that it referred only to "brokerage commission," and that while subsection 2(d) permits other compensation, it does not permit petitioner to receive the former type.

But, giving full weight to this contention, the evidence which petitioner was refused the opportunity to present, shows that the payments which it received were not "brokerage commission," but, *in fact,* were compensation for "services and facilities" *such as the respondent now admits* (brief, pp. 8-10) are compensable under subsection 2(d).

On the Commission's own showing, therefore, its action and the judgment below, we respectfully submit, completely deny to petitioner its statutory "right to * * * show cause why an order should not be entered by the commission,"[2] and directly conflicts with the unbroken line of de-

[2] Clayton Act, 38 Stat. 734; 15 U.S.C.A., sec. 21.

cisions of this Court entitling petitioner to a full and fair hearing on its defense.[3]

As to Respondent's Point 3

What has been said as to respondent's Point 2, applies equally here. The court below disposed of petitioner's contention, that the services rendered by it were compensable under subsection 2(d), by flatly stating that a purchaser could not render services to the seller from whom he buys (R. 106-107). This holding completely nullifies subsection 2(d) of the statute, which, *as pointed out in respondent's brief (p. 8), provides* for that very thing.[4]

The respondent argues, however, that as the cease and desist order applies only to "brokerage" or payment "in lieu thereof" and not to compensation for other services, the proffered evidence was immaterial to the issues in this case (brief, pp. 9-10).

Such an argument, however, entirely disregards two fundamental points involved in this proceeding. First, *no order* can be issued by the Commission herein without a past or present violation of the statute (38 Stat. 734; 15 U.S.C.A., sec. 21); Secondly, the Commission's order admittedly proscribes receipt of "brokerage" or payments "in lieu thereof," but the Commission prevented petitioner from making its proofs as to the true nature of the compensation it received. This evidence, we submit, *under the Commission's own admissions* (brief, pp. 9-10), would be a complete defense to the charge in the complaint, as the

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[4] Compensation for carrying warehouse stocks, and furnishing promotional and selling services and facilities, was prohibited by the Commission, in *Lambert Pharmacal Co.*, 31 F.T.C. 734, *American Crayon Co.*, 32 F.T.C. 306, and *Binney & Smith Co.*, 32 F.T.C. 315, *only* on the ground same was not proportionally available to all competing customers. There is no discrimination in the case at bar.

[3] Cases cited, petition, p. 7.

underlying payments—called "brokerage commissions" by respondent, and which it prohibits petitioner from showing are, *in fact,* something else—*are the identical items.*

The Commission does not deny the services alleged were, in fact, rendered; it does not find the compensation received therefor was discriminatory; but merely by virtue of denominating the compensation "brokerage," *the Commission insists that petitioner is estopped from showing it is anything else.* This means that the matter resolves itself into one of terminology.

Certainly, petitioner's right to receive compensation for its services should not be determined by the name by which it may be called. If such a position were sound, we would be exalting form and ignoring substance. The principle that substance rather than form shall be controlling is too well established to admit of serious controversy, and petitioner only ask that it be allowed to show, as it repeatedly has offered to do, the true nature of the compensation received, and the bona fide services which are actually rendered by it in consideration therefor. It is "not what the payments are called, but what, in fact, they are,"[5] that should govern.

We, again, very respectfully, submit that the proffered evidence is *highly material,* as going to the very root of the charged violation, and refusal to accept such proffered evidence was unreasonable, arbitrary, and wholly prevented petitioner from receiving the full and fair hearing to which it was entitled.

Conclusion

It is significant that, in citing other cases involving construction of subsection 2(c), the Commission does not deny the allegations of the petitioner (p. 7) that this is the first

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[5] *United States* v. *South Georgia Ry. Co.,* 107 F. (2d) 6; *Commissioner* v. *J. N. Bray Co.,* 126 F. (2d) 612.

or test case in which a merchandising broker, following well recognized and established brokerage methods, has been charged with violation of the Robinson-Patman Anti-Discrimination Act, for receiving non-discriminatory compensation, *solely because* in connection with the legitimate service it renders it takes title to some of the goods it distributes.

The Commission, likewise, does not deny that the decision here will penetrate deeply into accepted trade practices, in that many similar cases, involving both processors, or packers, and distributors, are being held by the Commission awaiting the decision of this Court in the case at bar (petition, p. 8).

In addition to the foregoing, we, again, respectfully submit, the judgment below involves a grave departure from the uniform decisions of this Court with reference to the fundamental requirements of findings of fact by administrative agencies, and the granting of full and fair hearings in such proceedings, and that such conflict should not be permitted to stand.

In view of the Commission's brief, the issues are clearly drawn, and further evince, we respectfully submit, that the writ of certiorari should issue as prayed in the petition.

Respectfully submitted,

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